

The Dutch response to the consultation by the European Commission on a possible amendment of the Communication on the application of state aid rules to public service broadcasting ('Broadcasting Communication') (consultation document, published on 10 January 2008)

1. General

The European Commission has expressed its desire for a new, more exact assessment framework, citing (1) the need for new rules in a digital media landscape and (2) its wish to translate 20 state aid decisions into policy.

The Dutch authorities have reservations about the necessity of revising the Broadcasting Communication. In the view of the Commission, such a revision will increase transparency and legal certainty. While the Netherlands applauds this intention, it would submit that existing rules – Article 86 (2) of the EC Treaty, the Amsterdam Protocol on public broadcasting and the present Broadcasting Communication – already offer adequate scope. After all, these rules have enabled the Commission to rule on 20 state aid cases. In the light of these cases, various member states have modified funding and regulatory structures for their public service broadcasters. These modifications demanded a customised approach: the measures that were taken adhere to national policy and address specific aspects of public service broadcasters in the member states. The Netherlands is concerned that revising the Broadcasting Communication will infringe on the member states' freedom to manage their public service broadcasting system as they see fit. Indeed, an over-specific Broadcasting Communication could entail just such a risk.

The Dutch authorities are also curious about the influence of the Amsterdam Protocol in the revision of the Communication. Many topics covered by the questionnaire issued by DG Competition stem from the conditions enumerated in the Community framework for state aid in the form of public service compensation. Yet given the Amsterdam Protocol, public service broadcasters occupy a special position. This is why there is a separate Communication on the application of State aid rules to public service broadcasting. The Dutch authorities believe that this special position is of great significance, particularly in the digital media landscape.

One last general question that the Dutch authorities have asked themselves pertains to the outcome of the consultation. A number of issues raised by the questionnaire have already been set down in decisions and play a part in pending cases. One example of this is the

market impact assessment that accompanies the ex ante evaluation of new media activities. If it should transpire that a large number of member states have reservations about such an assessment, how will the Commission factor these concerns into pending state aid cases concerning public service broadcasters?

There is also a procedural question regarding the reference in the Explanatory Memorandum (p. 2) to the Commission's Decision of 28 November 2005 on the application of article 86 (2) to services of general economic interest whose funding is below certain thresholds. As the Commission observes, this Decision is applicable mostly to regional and local public service broadcasters. Several regional broadcasters in the Netherlands have indicated that this Decision raises a number of questions in practice. Has the Commission scheduled a consultation for this Decision?

2. Defining the public service remit and approving new media activities

2.1 Definition and approval

The European Commission endorses the principle of a wide public service remit that can extend over various platforms. The Commission does, however, ask questions about how the member states allow 'new media activities' by the public service broadcasters. The issues raised include:

- an illustrative *list of activities* that are not covered by the public service remit and are thus permitted only as independent and self-supporting commercial activities;
- *prior approval* by member states of any new media activities undertaken by the public service broadcasters;
- *evaluation criteria* to determine if new activities serve the same democratic, social and cultural needs as the traditional public service broadcasters;
- the importance of examining citizens' needs, specific objectives of a public service, the *available offers on the market and the impact on competition (market impact assessment)*;
- the involvement of *third parties* in evaluating new media activities (complaint procedures);
- the possible role of *independent control authorities* in the evaluation process.

The Dutch authorities agree with many of the Commissions' proposals. Yet there is one major objection: the detailed procedural obligations imposed on the member states,

stipulating that existing market supply and the interests of third parties (including commercial entities) must be taken into account when evaluating new media activities undertaken by public service broadcasters.

The Netherlands and most other member states follow the principle that public service broadcasters have a wide and independent remit. Activities undertaken by public service broadcasters in fulfilment of their public service remit must meet the criteria inherent in that public remit, such as diversity, independence, quality, accessibility and reach. In the Netherlands all third parties, including commercial parties active on the market, have the opportunity to make known their individual interests and viewpoints, before the government or the control authorities decide which activities the public service broadcaster can engage in.¹ It would, however, be excessive to require each member state to conduct a wide-ranging market impact assessment in advance.

In point 36 of the current Broadcasting Communication, the role of the European Commission is 'limited to checking for manifest error' 'as regards the definition of the public service in the broadcasting sector'. E-commerce is cited as an example. The Communication goes on to say that it is not up to the Commission to 'decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product'. This implies a marginal control on the part of the European Commission. It is the member states' responsibility to define the necessity, role and task of public service broadcasters. Community law does not require member states to conduct a broad market impact assessment beforehand. Mandating such an assessment for every 'new' activity carried out by a public service broadcaster (as was done in the case of the German public service broadcaster) is an unacceptable restriction on the broad discretionary authority of the member states as laid down in the Amsterdam Protocol. In the consultation document the Commission refers to the Community framework for state aid in the form of public service compensation. Yet this Framework does not require the member states to perform a broad market impact assessment beforehand.

¹ Every five years the Minister of Education, Culture and Science grants *prior approval* to all activities outlined in the public broadcasting policy plan. For any new activities introduced subsequent to that point, the public service broadcaster must request interim approval upon submitting its budget. Two *autonomous bodies*, the Council for Culture and the Media Authority, advise the Minister on this matter. The assessment criteria are set down in the Media Act, which requires (1) diversity (a balanced mix of information, culture, education and entertainment from different perspectives, for audiences both large and small), (2) editorial independence, (3) professional quality, (4) accessibility and (5) reach among various target audiences. *Third parties* have the opportunity to present their reactions and points of view in the decision-making process. The public broadcasting policy plan and the draft decision by the minister are made public. Objections can be lodged against the Minister's decision, under the terms of the General Administrative Law Act.

The current framework, which gives the Commission only marginal powers of review, clearly states that it is up to the member states to define the public service remit of their public service broadcasters as they see fit and finance them accordingly. Given this division of authority, the introduction of a mandatory, broad, prior market assessment would be unwarranted.

The Netherlands also believes that the range of activities carried out by the public service broadcaster in the performance of its public service remit should be assessed *as a whole* rather than assessing each activity (programme, website, special interest channel, mobile service) individually. The public service broadcaster offers public content in various forms via various networks: regular radio stations and television channels, digital special interest channels, on-demand audiovisual media services, websites, etc. In the digital media landscape, 'old' and 'new' media activities are inextricably linked. The notion of a broad, prior market impact assessment for every new media activity individually fails to acknowledge this connection, entailing the risk that public service broadcasters, in performing their public service remit, will be forced to retreat to the realm of traditional radio and television. Moreover, the Dutch authorities feel that the difference between the public service broadcaster and commercial media is not always apparent from each individual activity but rather from the *whole range of activities*. Thus the Media Act mandates a different balance between popular and less popular genres, limits advertising and sponsoring, and demands a greater focus on target groups like young people, minorities, and the deaf or hearing impaired. These demands are translated into specific standards, which are set down in the performance agreement between the Minister of Education, Culture and Science and the public service broadcaster.

2.2 List of activities

The Dutch authorities question the need for and advisability of a list of activities that do not fall under the public service remit. The public service remit is laid down by law. The Media Act does not regard the sale of services and products with no connection to audiovisual production (like merchandising and e-commerce) as part of that remit. The five-year policy plan is published by the public service broadcaster, and public service remit activities must be approved in advance by the Minister. Ministerial decisions are also published.

Commercial activities by the public service broadcaster must be assessed beforehand by the Media Authority, and its decisions are catalogued on the Authority's website. In other words, all information about the activities of the public service broadcaster is publicly accessible, and the process is totally transparent. A list of activities that do not fall under the public

service remit is not necessary and not desirable. In the digital world it would be unwise to rule out certain technologies in advance.

2.3 Pay services

The Dutch authorities feel that no restrictions should be imposed on pay services which are part of the public service remit of the public service broadcaster. Two types of pay services can be distinguished:

- (1) services that are part of a package from a distributor that passes on costs to end users, such as a special interest channel in a digital cable package;
- (2) services for which end users pay the public service broadcaster directly, such as the ability to consult an online programme archive.

In the digital media landscape, the practice of charging end users is a growing and indispensable source of income for audiovisual productions, along with advertising and State funding. To keep pace amid the expanding assortment of digital products, public service broadcasters should also be able to tap into this source of income. The Netherlands regards extra payment by end users as a legitimate (future) element of the mixed financing of these broadcasters' public service remit. This is particularly true for member states with a small market: in those countries it is more difficult to raise the necessary funds for an innovative, multimedia public service broadcaster through taxes, advertising and income from the broadcaster's commercial activities. If the Commission shares this point of view, the same criteria and procedures should apply to the assessment of pay services as to the assessment of any other services performed by public service broadcasters.

3. Financing and proportionality

Parameters for compensation

The Dutch authorities find that the present Communication is adequate in this regard as well. They are not in favour of including the more far-reaching condition that the member states must set parameters to determine the amount of compensation. In this case too, the rule applies that every member state has its own special legislation and budgetary system for financing its public service broadcasters. There should be enough flexibility to allow for a case-by-case approach.

Conditions for sport

The Dutch authorities do not think it advisable to include specific conditions for the funding of premium sport rights in the Communication. The decision on whether to include sport (whether premium sport or less popular ones) as part of the public service remit lies at the discretion of the member state. There is no reason why the public funding of sport broadcasts should be assessed differently than the funding of other elements of the public service remit. Even in cases where sport is classified as part of the public service remit, there should be no infringement of member states' broad discretionary powers with regard to defining and financing that remit.

Formation of a reserve

The Dutch authorities agree with the Commission that the possibility of forming a 10% reserve is also necessary for public service broadcasters. Financial stability is a prerequisite for a well-functioning public broadcasting system, as it safeguards the public service broadcaster's independence from the State. The public service broadcaster must be capable of managing its affairs over the middle and long term. This means that it needs a financial buffer that can absorb fluctuations in income and costs. The present Broadcasting Communication does not rule out this possibility.

Public service broadcasters in the Netherlands operate an accrual accounting system. That is, the payments and revenues are attributed to the period to which they relate. As a result, there are surpluses in some periods and shortfalls in others. Such fluctuations can be absorbed by available reserves. Reclamation (as provided for in the framework) or netting of reserves below the 10% cap poses a serious threat to the functioning of the public service broadcaster because the measures can lead to acute liquidity problems, given that the reserves are maintained for funding programme resources and fixed assets. Moreover, there will always be a need for a modicum of liquid resources to absorb fluctuations in payments and revenue.

The Dutch authorities are opposed to more far-reaching demands with respect to the formation of a reserve, as regards the size of the surpluses above the 10% to be transferred, the reserve mechanisms or the maximum period for which financial buffers can be maintained. The financing mechanisms in the various member states are too different to formulate a more far-reaching general rule. There should be freedom for a case-by-case approach.

Efficiency savings and profit margins

Public service broadcasters are not out to make a profit but to perform a legally mandated public service remit. An attempt by the government immediately to reclaim all efficiency savings from the public service broadcaster will not encourage the pursuit of greater efficiency. The Dutch authorities feel that the public service broadcaster should retain these savings, on the condition that they are used to fund the public service remit.

It should also be possible for the public service broadcaster to retain any surplus as long as these extra funds go towards the public service remit. If any funds are left at the end of the year, they can be added to the programme reserve for the fulfilment of the public service remit, up to a maximum of 10%.

4. Separation of public and commercial activities

The Commission has made proposals for a more precise framework for the attribution of costs to the public service remit and commercial activities, and it would like to impose stricter conditions for the formation of a reserve. The Dutch authorities are in favour of clarifying the rules for the functional separation of the accounting and the attribution of costs to the public service remit and commercial activities. The rules set down in the present Broadcasting Communication (paragraphs 55 and 56) are too abstract in some cases and not always workable in practice. It may be helpful to include provisions that are more in line with what goes on in practice.

In the Dutch system the separation between public and commercial activities is guaranteed. All income from the public service broadcaster (including public funding and income from commercial and association activities) must be spent on the public service remit. Commercial activities must be self-supporting (cross-subsidisation using public funds is banned), and all commercial activities must be carried out on market terms. To adhere to the ban on cross-subsidisation, the public service broadcaster is obliged to keep separate accounts for commercial activities and the public service remit activities.

The Dutch authorities understand that the Commission might express a preference for an organisational separation between public and commercial activities. The Netherlands would also like to entrust commercial activities to a separate entity because this would make it easier for the control authority to monitor such activities and attribute the costs appropriately. Yet at the same time, the Dutch authorities do not believe there should be an *obligation* to make an organisational distinction between public and commercial activities.

A functional separation within the public service broadcaster can also be sufficient, if all the transparency and separation requirements have been met. The Transparency Directive does not require the member states to make a structural distinction.